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SUPREME COURT OF THE UNITED STATES

APR 11
CHARLES ELMORE

OCTOBER TERM, 1930.

MERCHANTS WAREHOUSE COMPANY,
Appellant,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND JAMES GALLAGHER, ET AL.

No. 635.
October Term, 1930.

MERCHANTS WAREHOUSE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, ET AL.,
Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND JAMES GALLAGHER, ET AL.

No. 636.
October Term, 1930.

THE PENNSYLVANIA WAREHOUSING AND SAFE DEPOSIT COMPANY,
Appellant,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND WALTER A. BAILEY, ET AL.

No. 638.
October Term, 1930.

THE PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, ET AL.,
Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND WALTER A. BAILEY, ET AL.

No. 639.
October Term, 1930.

PHILADELPHIA WAREHOUSING & COLD STORAGE COMPANY, THE COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, ET AL.,
Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND REX & COMPANY, INC., ET AL.

No. 642.
October Term, 1930.

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Appellants' Brief on Behalf of Merchants Warehouse Company, Pennsylvania Warehousing and Safe Deposit Company, Commercial Exchange of Philadelphia, Philadelphia Board of Trade, Philadelphia Bourse, Grocers' and Importers' Exchange of Philadelphia, and Association of Manufacturers' Representatives, Inc.

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Supreme Court of the United States

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Appellants, } No. 642.

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BRIEF ON BEHALF OF MERCHANTS WAREHOUSE COMPANY, PENNSYLVANIA WAREHOUSING & SAFE DEPOSIT COMPANY, COMMERCIAL EXCHANGE OF PHILADELPHIA, PHILADELPHIA BOARD OF TRADE, PHILADELPHIA BOURSE, GROCERS' AND IMPORTERS' EXCHANGE OF PHILADELPHIA, AND ASSOCIATION OF MANUFACTURERS' REPRESENTATIVES, INC., APPELLANTS.

OPINION OF THE COURT BELOW.

The Opinion and Dissenting Opinion of the Court below are reported in 44 Fed. 2nd, 379 to 392, and also will be found at pages 30 to 58 of the Record.

JURISDICTION.

Paragraph 1 of Rule 12 has been complied with and probable jurisdiction has been noted by this Court.

STATEMENT OF THE CASE.

These Cases are in this Court on appeal from the District Court of the United States for the Eastern District of Pennsylvania. The District Court dismissed Bills filed by three Warehouse Companies, The Merchants Warehouse Company, the Pennsylvania Warehousing and Safe Deposit Company, and the Philadelphia Warehousing and Cold Storage Company, praying for an injunction to restrain the enforcement of an Order of the Interstate Commerce Commission. All three Bills were heard in the District Court as a single case, and come up to this Court on a single Record.

The Appellant Warehouse Companies own and operate public warehouses in the City of Philadelphia.* At these warehouses the Pennsylvania, Reading, and Baltimore and Ohio Railroads have, respectively, for many years, by appropriate tariffs filed with the Interstate Commerce Commission, undertaken to load and unload carload package freight. These services are performed by the Appellant warehouses under the terms of written contracts with the said carriers. Pursuant to these contracts, which are of some forty years standing, the warehouse companies load and unload carload package freight and render a variety of incidental services for the carri-

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*The Merchants Warehouse Company has ten warehouses connecting with the Pennsylvania Railroad. The Pennsylvania Warehousing and Safe Deposit Company owns or operates ten warehouses, some of which connect with the Reading Company, others with the Baltimore and Ohio Railroad Company. The Philadelphia Warehousing and Cold Storage Company has a cold storage plant on the lines of the Reading Company.

ers, which are generally known as terminal services, for which they receive a fixed compensation stipulated in said contracts. The Appellant, Merchants Warehouse Company has contracts for its warehouses with the Pennsylvania Railroad Company, the Pennsylvania Warehousing & Safe Deposit Company has such contracts with the Reading Company and the Baltimore and Ohio Railroad Company, and the Philadelphia Warehousing and Cold Storage Company has a contract with the Reading Company. These three Appellant warehouses are hereinafter referred to as the "contract" warehouses.

The validity of these contracts was never questioned until six warehouse companies in Philadelphia, which had no such contracts with the carriers, by proceedings instituted before the Interstate Commerce Commission, attacked the contracts on the ground that they were unjustly discriminatory, and unduly preferential, and that the payments made thereunder to the contract warehouses constituted a rebate in violation of the Interstate Commerce Act. These six warehouses are hereinafter referred to as the "complaining" warehouses.*

Three complaints were filed before the Commission, one against the Pennsylvania Railroad, another against the Baltimore and Ohio Railroad and the third against the Reading Company.

In the proceedings before the Commission the three complaints were consolidated, and heard as a single case. At or before the hearing, the contract warehouses, and the principal organizations of merchants in Philadelphia, interested in the trade affected, intervened on behalf of the Defendants. These organizations are: The Com-

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* The complaining warehouses before the Commission were:

James A. Gallagher;	Terminal Warehouse Company
Northeastern Warehouse Company,	Rex and Company, Inc.
Walter A. Bailey,	Industrial Cold Storage Co.

mercial Exchange of Philadelphia consisting of dealers in grain, flour and similar commodities, The Grocers' and Importers' Exchange of Philadelphia, consisting of persons who deal in canned goods, dry groceries and similar food products, The Association of Manufacturers' Representatives, Inc., consisting of distributors of manufactured products, The Board of Trade of Philadelphia, and the Philadelphia Bourse, which are merchants' organizations of broader composition. The Millers' National Federation, an organization of western shippers, intervened in behalf of the Plaintiffs. All of the above parties presented testimony and participated in the argument before the Commission.

On December 28th, 1929, Division 3 of the Interstate Commerce Commission filed its Report and Order in the case. (R. 142 to 152.) The Order required the said carriers to cease and desist from making payments to the contract warehouses for the loading and unloading of freight at Philadelphia, in accordance with the terms of said contracts, and likewise required them to cancel their tariff provisions which made the contract warehouses a part of the carriers' freight station facilities at Philadelphia.

Petitions for a re-hearing before the full Commission were denied in a formal order made by the Commission (R. 178).

Thereafter the three contract warehouses filed their Bills in the District Court, against the United States and the Interstate Commerce Commission, praying that the above Order be declared null and void. Pursuant to the statutory requirements, (Act of Congress approved October 22nd, 1913, 38 Stat. 220, U. S. Code, Title 28, Section 47), a three-judge court consisting of Circuit Judge Buffington, and District Judges J. Whitaker Thompson and Oliver B. Dickinson, was duly convened, (R. 16, 28). The

Court granted a temporary stay of the Commission's Order. (R. 18, 29.) At final hearing all of the evidence before the Commission was introduced in evidence. (R. 181.) The complaining warehouses intervened as parties defendant, and the commercial organizations above named intervened as parties Plaintiff. The carriers were not parties to the suit and have taken no part in the proceedings before the Court.

After due consideration, the Court handed down a majority opinion dismissing the Bills. (R. 30.) A dissenting opinion was filed by Judge Buffington. (R. 43.) Findings of Fact and Conclusions of Law (R. 58), were also made by the Court, to which exceptions were duly filed. (R. 64 to 66.)

The formal decree dismissing the Bills was filed November 19th, 1930, (R. 95), and the same day the contract warehouses appealed to this Court. The Commissions' order was stayed by the Court pending this appeal. (R. 109, 821, 878.) The reasons for granting the stay were set forth in a separate per curiam opinion. (R. 92.) From this order the Government has taken cross-appeals.*

The appeals of the Warehouse Companies are docketed in this Court as Numbers 635, 638 and 641, October Term, 1930. Those of the commercial organizations as Numbers 636, 639, 642, and the Government cross-appeals as Numbers 637, 640, 643 of the same term.

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* To remove any uncertainty whether the appeals of the contract warehouses brought the commercial organizations into this Court, as parties appellant, the commercial organizations subsequently filed their own petitions for appeal. These petitions were duly allowed by an Order which recited that the commercial organizations, intervenors in behalf of the Plaintiff, "are hereby joined as parties appellant to the said appeal heretofore allowed to the plaintiff" (R. 104).

SPECIFICATIONS OF ERROR.

The principal error assigned is the dismissal of the Bills and the refusal to enjoin the Order of the Commission. The detailed specifications of error, (all of which are intended to be urged here), are set forth in the Assignments of Error, (R. 96).

SUMMARY OF ARGUMENT.

I. The Contracts between the Appellant warehouses and the carriers are contracts of agency whereby the warehouses are employed to render a transportation service. This service, the carriers have, by appropriate tariff publications, undertaken to perform for the public. These contracts provide that the warehouse company shall load and unload freight received by it to be shipped over the railroad line, or received by it from the railroad for delivery to the consignees, and to render on behalf of the carrier various other services incidental to such receipt and delivery of freight. The compensation for the service, which varies according to the nature and volume of the traffic, is fixed by the contracts. These terminal services of loading and unloading carload freight are undertaken by tariffs duly filed with the Interstate Commerce Commission, and the tariffs name the contract warehouses among the stations at which this service will be performed. A substantial proportion of the freight handled through the contract warehouses receives no warehousing service whatever. The service rendered by the contract warehouses is a transportation service within the meaning of Section 1 of the Interstate Commerce Act (24 Stat. L. 379; 41 Stat. L. 479; U. S. Code Title 49, page 1651), which defines "transportation" as including "all services in connection with the

receipt, delivery, * * * storage and handling of property transported."

II. The carriers have the right to select their own agents, and the advantages incidental to such agency do not constitute unjust discrimination. A carrier may exercise its own discretion in the selection of its agents and employees to perform any part of its transportation duties. Therefore, it may contract with one warehouse for the performance of terminal services and use of facilities and be unwilling to make similar contracts with other warehouses. United States vs. Baltimore and Ohio Railroad Company, (The Arbuckle Case) 231 U. S. 274; Interstate Commerce Commission vs. Diffenbaugh, (The Peavey Case), 222 U. S. 42. The Commission has held that terminal services are transportation services, and the relation between the carrier and the person who performs the service is that of agency. Keystone Elevator and Warehouse Company vs. Director General, et al., 73 I. C. C. 273. The fact that the arrangement may incidentally be of value in the conduct of appellants' warehouse business does not make the arrangement illegal, preferential and discriminatory. United States vs. Baltimore & Ohio Railroad Company, 231 U. S., at page 290; Peavey Case, 242 U. S. 42; St. Louis Terminal Case, 34 I. C. C. 453; Delaware, Lackawanna and Western R. R. Co. vs. Morristown, 276 U. S. 182; Donovan vs. Pennsylvania Co., 199 U. S. 279; Brown & White Taxi Cab Co. vs. Brown and Yellow Taxi Cab & Transfer Co., 276 U. S. 518; Chicago & New Orleans R. R. Co. vs. Pullman Southern R. R. Co., 139 U. S. 75; Express Cases, 117 U. S. 1.

III. The contracts were made in good faith and not as a cover for any fraudulent scheme to give rebates or any other illegal advantage. The practice of loading

and unloading carload freight in the central section of Philadelphia is of long standing. The first Merchants Warehouse was built in 1887, jointly by the Pennsylvania Railroad and the shipping public, as a convenient method of handling flour. The system has extended to include the other railroads, other warehouses and other commodities. The shipping public is directly benefited, and has come to rely upon it. The railroads are benefited by prompt release of equipment and by gaining additional and necessary terminal facilities. The Government, during the Railroad Administration, continued the arrangement and increased the compensation. There has never been any secrecy or any suggestion of corrupt motives, or of injury to the shipping public.

IV. The Contract warehouse companies are not the Consignors or Consignees of freight loaded or unloaded at their warehouses. The statement of the Commission that the contract warehouses should be "deemed" the consignors of shipments from, or consignees of shipments to their warehouses, is a pure fiction. Inbound goods are billed to the shipper's order, or to the real owner, or his broker, care of the contract warehouse, and outbound goods are billed by the owner, or his broker, without mention of the contract warehouse. In the practice of the shippers of Philadelphia, the contract warehouse is a place of delivery, and an alternative of other freight houses or the team-track, and is not the consignee. The delivery of a carload of goods to two or more persons upon orders from the consignee is a practice known as split-deliveries, in effect at some of the railroads' other freight stations. This is a frequent but not a universal practice, at the contract warehouses. It does not show that the billed consignee is not the real consignee. The billed consignee is the consignee in fact. He is likewise the consignee in law, as that term is defined in the Bills of Lading Act, U. S. Code, Title 49, Section 122.

V. Payments made to the contract warehouses are not rebates. The word "rebate" as used in the Interstate Commerce Act means merely an unjust discrimination; as used in the Elkins Act (U. S. Code Title 49, Sec. 41) it means a secret departure from the published rate. The entire arrangement is provided for in published tariffs. The arrangement is well known to the shipping public which avails itself of its many advantages. There is no suggestion of corruption or underhandedness. The payments are reasonable compensation for a legitimate service and they are not rebates, Interstate Commerce Commission vs. Diffenbaugh, 222 U. S. 42.

VI. The contract warehouses are public freight stations.

The carriers by their tariffs hold themselves out as willing to receive and deliver freight at the contract warehouses. This makes them public stations. Tap Line Cases, 234 U. S. 1. The use of the contract warehouse companies' warehousing facilities is not made a pre-requisite to the use of the contract warehouses as freight stations. As a matter of fact a substantial proportion of the outbound tonnage, and from 35% to 85% of the incoming tonnage goes through the contract warehouses without using their warehouse facilities. In this respect this case differs from the Baltimore Case, Terminal Warehouse Company vs. United States, 31 Fed. 2nd, 951, and resembles the Arbuckle Case, United States vs. Baltimore and Ohio R. R. Co., 231 U. S 274.

VII. Assuming, *arguendo*, that a finding of unjust discrimination and undue prejudice under Sections 2 and 3 of the Interstate Commerce Act, 24 Stat. L. 379 U. S. Code, Title 49, pages 1653-54, was valid, the order which was made exceeded the power of the Commission in that it went beyond a requirement that the carriers cease and de-

sist from the violations of the Act. Even if the contract warehouses were shippers the power of the Commission extends no further than to require the carriers to give the complaining warehouses equal treatment with them. Its order must leave the carriers "free to remove the discrimination by any appropriate action". United States vs. Pennsylvania Railroad, 266 U. S. 191. In this case, however, the Commission, erroneously conceiving that the payment for terminal services to all the warehouses would be illegal per se, ordered that they be cancelled altogether. This violated the contract rights of the appellant warehouses, and compelled the carriers to curtail a service desirable to the public which the carriers were willing to render. The order also directs the carriers to cancel their tariff provisions naming the contract warehouses as part of their station facilities in Philadelphia. This is tantamount to ordering them to abandon freight stations. Such an order is beyond the power of the Commission.

VIII. The Court below had jurisdiction. Inasmuch as the Commission's order directed the carriers to cancel their contracts with the appellant warehouses, which are named in the order, the appellant warehouses have standing to ask the Court to enjoin the Commission's order. Their status is similar to that of the Plaintiff in Interstate Commerce Commission vs. Diffenbaugh, 222 U. S. 42, and United States vs. Hubbard, 266 U. S. 474, and differs from that of the plaintiff in Sprunt and Sons vs. United States, 281 U. S. 249.

ARGUMENT.

POINT I.

The contracts between the Appellant warehouses and the carriers are contracts of agency whereby the warehouses are employed to render a transportation service. This service the carriers have, by appropriate tariff publications, undertaken to perform for the public.

The Appellant, Merchants Warehouse Company, has nine contracts with the Pennsylvania Railroad Company, in connection with the operation of ten warehouses, which are situated on the lines of said carrier. (See contracts, R. 455-526.) These contracts are of various dates, but are substantially similar in their provisions.

The Appellant, Pennsylvania Warehousing and Safe Deposit Company has contracts with the Baltimore and Ohio Railroad Company, and the Reading Company, formerly the Philadelphia and Reading Railway Company, for the operation of ten warehouses, some of which are situate on the lines of the Reading Company, and others on the lines of the Baltimore and Ohio Railroad Company. (See Reading contracts, R. 603 to 692; see Baltimore and Ohio contracts, R. 711 to 739.)

The Appellant, Philadelphia Warehousing and Cold Storage Company has a cold storage plant on the lines of the Reading Company, which is operated under the terms of a single contract, (R. 664).

All these warehouses are situate in the City of Philadelphia, in different localities convenient for the receipt and delivery of carload package freight. These contracts are of various dates and the terms differ in some instances, but so far as all of said contracts bear on the issues of this case, they are substantially similar in their provisions, and one contract may be taken as a specimen of all of them. The contract between Appellant, Mer-

chants Warehouse Company, and the Pennsylvania Railroad Company, dated January 25th, 1917, (R. 455), runs for the period of twenty years from its date, and has for its object the handling and storage of flour, grain and other merchandise in the warehouses of the Merchants Warehouse Company situate at Delaware Avenue and Walnut Streets, in the City of Philadelphia. The essential terms of this contract are as follows:

First: The Pennsylvania Railroad agrees:

(a) To maintain railroad tracks adjacent to the warehouses, do the necessary shifting for the purpose of taking and delivering all freight cars to be shipped therefrom or destined thereto.

(b) To pay to the said Warehouse Company for all services rendered by it in and about the receipt and delivery of freight for account of the Railroad Company, both incoming and outgoing at the said warehouses, the amounts following: Three and one-half cents (3½¢) per barrel for each barrel of flour up to fifty thousand (50,000) barrels per month; two and one-half cents (2½¢) per barrel for each barrel over the said fifty thousand (50,000) barrels per month, and during the first two years of the life of this agreement, forty cents (40¢) per ton (of 2,000 pounds) for each ton of merchandise, and during the following years that the agreement is in force, thirty-five cents (35¢) per ton (of 2,000 pounds) for each ton of merchandise, except that no payment shall be made upon bulk freight nor upon freight the movement of which by the Railroad Company has been performed at a switching rate, nor upon material and supplies belonging to the Railroad Company.

(c) While this contract is in force the Railroad

will not make any similar contract with any other person or corporation.

Second: The Warehouse Company agrees:

(a) At all times to accord to traffic passing over the railroad company's system, preference in the facilities furnished by the warehouse over traffic passing over other lines.

(b) To promptly load and unload and handle all freight received by it to be shipped over the lines of the Railroad Company or received by it for delivery to consignees and in the case of incoming freight to promptly notify the consignees of the arrival thereof.

(c) To be responsible to the railroad company for the prompt collection of all freight and other charges upon inbound freight, payment to be made by the warehouse company to the railroad company on the fifth day of each month of freight and other charges due on account of all freight delivered to it during the preceding month, excepting, however, any such charges which the railroad company may from time to time elect to collect direct from any consignee; the warehouse company to give bond to the railroad company to secure the performance of the contract.

(d) To indemnify the railroad company for all damage to or loss of freights and to keep adequate and sufficient fire insurance.

(e) To promptly notify the railroad company of the failure of any consignee to remove freight.

(f) To indemnify the railroad company against liability on account of acts or omissions of the warehouse company.

(g) To keep the warehouse properly equipped to handle traffic promptly.

Third: It was mutually agreed that freight not moved within the free time should be treated as stored with the warehouse company for account of the owners thereof.

Fourth: That no assignment of the agreement should be valid without the consent of the railroad company.

Fifth: That the agreement should remain in effect from the first of February, 1917, for twenty years.

Sixth: If the terms of the agreement should be found to work onerously it shall be subject to revision at the end of any period of two years and if the parties cannot agree upon such revision, it shall be submitted to arbitration.

The performance of the services specified under said contracts is described in detail in the testimony of Witness Justice, (R. 399), and Witness Richardson, (R. 385), and may be summarized as follows:

(a) With respect to inbound freight (R. 399): After the cars have been placed on the sidings of Appellants' warehouses, Appellants inspect and break the seals of the cars, open the doors, unload the cars, tally the contents thereof, make note of any damaged contents, and report the damage, overage or shortage of contents to the carriers. They carry insurance upon the goods contained in the cars, and give free storage for the period of forty-eight (48) hours after arrival. They send out arrival notices to the owners

of the merchandise, and on behalf of the carriers, make collection of the freight charges. They deliver the goods to the consignee, or to anyone presenting an order from the Consignee directing the delivery of a portion or all of the goods.

(b) With respect to outbound freight (R. 385): The shippers bring the freight to the receiving doors of the warehouses with their shipping papers, and direct the warehouses to load the freight. The warehouse companies take the freight off the platform and place it in the car, properly stowed away. They then seal the car, take the Bill of Lading, which has been prepared by the shipper, to the Railroad freight agent having jurisdiction, and after its signature, delivers the signed Lading to the shipper.

The undertaking by these three trunk lines that serve Philadelphia to load and unload carload traffic carried at carload rates is in the nature of an exception to Rule 27 of the Consolidated Freight Classification, which provides as follows, (R. 708, 696, 697):

"Section 1. Owners are required to load into or on cars freight for forwarding by rail carriers and to unload from cars freight received by rail carriers carried at carload ratings."

This general rule that the owner shall load and unload carload freight, (R. 708), has numerous exceptions, and among these is the following exception, which is set forth in the tariffs of the Pennsylvania Railroad, (R. 708, 710), providing as follows:

"At Philadelphia, Pennsylvania, package freight carried at carload rates will be loaded or unloaded by the carriers at the stations in Philadelphia specified

below, except when handled direct to or from cars on team tracks at owner's request."

The tariff provided (G. O. I. C. C. #14322 Supplement No. 6, effective May 10th, 1926):

"Rule 32. Warehouses considered freight stations during free time.

"In the application of storage rules and charges as published in Agent B. T. Jones' I. C. C. #1491, P. S. C.—Pa. #86, Agent's Index #54, supplements thereto or re-issues thereof of the following warehouses in Philadelphia, Pa., are considered freight stations during the free time."

Next follows in the said tariff a list of the warehouses of the Merchants Warehouse Company, which are by this tariff, considered freight stations of said carriers.

The Baltimore and Ohio Railroad Company in like manner, in tariffs filed with the Commission, has undertaken to load and unload carload package freight at Philadelphia, and has made designated warehouses of the Pennsylvania Warehousing and Safe Deposit Company its freight stations for the purpose, whereas the Reading Company took the view that publication in the tariffs was not necessary, as the warehouses of the Pennsylvania Warehousing and Safe Deposit Company were included as a part of its railroad freight terminals which they immediately adjoined.

The arrangement which these carriers have made with the so-called contract warehouses results in the expeditious handling of carload package freight at these twenty-one convenient public warehouse stations, and insures the release of railroad cars and equipment in a manner such as otherwise could not be accomplished. Track and platform delivery, which would replace the

present arrangement would retard the movement of railroad equipment and not only result in loss to the carriers, but cause congestion in the clearance and distribution of freight and expense to the shippers. As was said by Judge Buffington, in his dissenting opinion, in the lower Court, "Moreover, it goes without saying that the instant discharge of carload freights made by the contract warehouses and the consequent return to service of the cars, instead of allowing such cars to congest on railroad sidings, and await discharge by a consignee at the end of forty-eight hours, is a **basic factor in prompt railroad freight service.**" (R. 48.)

The services rendered to the carriers are attested by the fact that in the case of the Pennsylvania Railroad, for the first nine months of 1928, the year during which the testimony before the Commission was taken, there were 744 cars of outbound freight loaded by the Merchants Warehouse Company, which is at the rate of about 1000 cars per year. This traffic was brought to the platforms of the warehouse company, as a public freight station, by wagon and truck, and loaded directly into the freight cars for shippers who had no previous connection with the warehouse company whatsoever. (R. 439, 452.) Approximately 10,000 cars a year are handled by this one warehouse company, the greater portion of which constitutes inbound freight. A large proportion of the freight received at the warehouses from the carriers is delivered to the consignees within the 48 hours free time provided in the railroad tariffs. No payment whatsoever is received by the appellant warehouse companies from shippers or consignees for the use of the facilities and services afforded. It is a transportation service rendered for the three carriers mentioned. In some of the warehouses of the Merchants Warehouse Company 35% of the merchandise received is delivered within the 48 hours free time.

At other of its warehouses 75% of the amount so received was delivered to the actual consignee and not warehoused at all (R. 386).

At the Pennsylvania Warehousing and Safe Deposit Company stations, 40% to 60% of incoming freight was taken away without being stored. (R. 401.)

At the Philadelphia Warehousing and Cold Storage Company stations, 80% of the merchandise received was delivered within the 48 hours free time and no storage paid. (R. 310.)

It cannot be denied in truth or in fact that a transportation service is being rendered by these public stations of the carriers at the warehouse companies. Judge Buffington, in his dissenting opinion, finds these facts, in the following language:

> "We have already noted some of the facts in reference to the use of these warehouses as public freight stations and reference is further made to the fact that 35% at some of the contract warehouse stations and 75% at others were delivered to the actual consignees within the forty-eight hours of free time and were not warehoused at all. At the Pennsylvania Warehousing stations from 40 to 60% of incoming freight were taken away without being stored, and at the Philadelphia Warehousing and Cold Storage Station 80% were so taken." (R. 57).

The character of the service rendered or the instrumentality used in aid of transportation may vary in the several cases. In the one case the facility may be a dock, a warehouse, a car float, a steam-lighter or a grain elevator. It may be a service of elevating grain, loading or unloading freight, lighterage of merchandise, storage, refrigeration or icing of the property and goods transported.

The true test is whether the service or facility is included within the term "transportation" and the instrumentalities and facilities connected therewith. The answer is to be found in the first instance in the Interstate Commerce Act, Section 1, wherein it is provided (24 Stat. L. 379; 41 Stat. L. 479; U. S. Code Title 49, page 1651):

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, **and all instrumentalities and facilities** of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and **all services in connection with the receipt, delivery,** elevation and transfer in transit, ventilation, refrigeration or icing, **storage and handling** of property transported."

There is nothing in the Interstate Commerce Act which prevents the Carrier assuming the obligation of loading and unloading carload freight, and when it does so by proper tariff publication, it necessarily becomes a duty which it must perform. There is nothing in the Act that precludes the performance of the duty through such agencies as it chooses to employ.

POINT II.

The carriers have the right to select their own agents. The advantages incidental to such agency do not constitute unjust discrimination.

By these contracts the carriers have made the appellant warehouse companies their agents for rendering a transportation service. It is well settled that a carrier

may exercise its own discretion in the selection of its agents and employees to perform any part of its transportation duties. Therefore, it follows that it may contract with one warehouse for the performance of terminal services and use of facilities and be unwilling to make similar contracts with other warehouses. It does not follow that it is a discrimination or unlawful preference against the one who is not so selected as an agent of the carrier. In other words the advantages incidental to such an agency contract do not constitute unjust discrimination within the meaning of the Interstate Commerce Act.

At this point the attention of the Court may be called to the striking analogies between the present case and the decisions of this Court in

United States vs. Baltimore & Ohio Railroad Company, (The Arbuckle Case), 231 U. S. 274

and in

Interstate Commerce Commission vs. Diffenbaugh (The Peavey Case), 222 U. S. 42.

In all three cases there are involved contracts whereby the carriers employed others to render a portion of their transportation service. In all three cases competitors of the agents so employed by the carriers filed complaints before the Commission that such contracts were unjustly discriminatory and unduly preferential, and that the payments made for the services rendered constituted, in fact and in law, rebates. In all three cases the Commission ordered the practices to cease, and declared that the payments made were rebates.

This Court in the Arbuckle and Peavey Cases annulled the orders of the Commission and sustained the validity of the contracts.

It is respectfully submitted that an examination of the facts and decision of this Court in the so-called Arbuckle Case will show it to be decisive of the case at bar.

United States vs. Baltimore & Ohio R. R. Co., 231 U. S. 274.

Arbuckle Brothers Sugar Company, acting under the name of "The Terminal Company", entered into a contract with the Baltimore and Ohio Railroad Company and other carriers to perform certain terminal and lighterage services from Brooklyn to Jersey City. The Arbuckle contract provided as follows: (231 U. S. 283.)

> "2. The Terminal Company will receive at the New Jersey terminals all freights, in or out of cars, intended for delivery at the aforesaid freight station and safely convey the same to the premises and there make delivery to the consignees. It will also receive and load into cars all freights which may be delivered to it at its said premises for transportation over the lines of any of said railroad companies and carry and deliver the same to said railroad company's New Jersey rail terminals.
>
> 3. For the facilities supplied and the services performed each of the railroad companies agrees to pay on freight in and out of the station, a compensation measured by the tonnage handled for each such railroad of four and one-fifth cents per hundred pounds on freight originating at or destined to points west of what is called 'trunk line territory', and on freight originating at or destined to points east thereof, three cents per hundred pounds."

The Arbuckle Company was itself a large shipper of freight at said station and received the same payments for terminal services for its own freight as upon the ship-

ments made by other persons. The Federal Sugar Refining Company, a competitor of Arbuckle Brothers had its refinery at Yonkers on the Hudson River, just outside of New York Harbor, and performed on its own account the same services in connection with the shipments of its sugar as were performed by Arbuckle at its contract station. The carriers refused to make any payment to the Federal Company, which thereupon filed its complaint with the Commission, alleging undue preference and discrimination on the part of the carriers in making payments to the Arbuckle Company and in refusing to make like payments to the Federal Company. The Commission decided that the arrangement with the Arbuckle Company was discriminatory and preferential, that the payments made were rebates, and ordered the practice discontinued.

This Court annulled the order of the Commission, sustained the validity of the arrangement, and of the payments to the Arbuckle Company. With respect to making the warehouse of the Arbuckle Company a public freight station the Court said, (at page 287):

> "That the plain purpose of the contracts between the several railroad Companies and the Terminal Company was to constitute the dock and warehouses of that company a public freight station is too clear for extended discussion. That the premises became such a depot through contract with the owners and not by virtue of a fee simple title or a lease is of no legal significance. Railroad Commission of Kentucky v. L. & N. Railroad, 10 I. C. C. Rep. 173, 175; Cattle Association v. C. B. & Q. Railway, 11 I. C. C. Rep. 277."

This Court held that under such a contract Arbuckle Brothers became the agents for the several carriers and said, (at page 290):

"Upon all of the conceded facts of the case, we must conclude that the contracts by virtue of which the premises owned by Arbuckle Brothers were converted into a public freight station under their management as agents for the several carrier lines were contracts made in good faith and not **as a cover for any fraudulent scheme to give rebates** or any other illegal advantage. The case must turn here, as it did before the Commission and in the Commerce Court, upon the question whether the allowance to Arbuckle Brothers of compensation upon their own shipments was for instrumentalities and services accessorial in character."

This Court further said, (at page 289):

"The order of the Commission is made to rest upon an erroneous assumption that the services performed by Arbuckle Brothers in respect to their own westbound shipments of sugar after the delivery of such sugar at this station is a shipper's service, done for their convenience, with their own facilities, and, therefore, an accessorial service for which they cannot be allowed compensation unless a similar compensation is allowed to the Federal Sugar Refining Company for the lighterage of its sugar to the west shore railroad terminals.

That certain advantage inured to Arbuckle Brothers from the fact that their refinery was so near this public station that their product might be trucked or carted to the station at slight cost is obvious. That this was a consideration which operated as an inducement to make these contracts may be true. But this mere advantage of nearness was one which they shared in common with every other shipper who chanced to be near a shipping station.

That they were large shippers was also more or less an inducement to the railroads to place their depot in a locality which would tend to secure their shipments as against rival carriers may also be conceded. **But these were business considerations which are far from showing any purpose to give them any illegal preference or to discriminate against other shippers."**

In sustaining the payments made by the carriers for the services, this Court said, (at page 296):

"To say that the 'allowance' made to Arbuckle Brothers is an allowance for lightering their own sugar across the river is to only half state the case. This so-called allowance is not only for such lighterage service, **but is also compensation for the use of all of the terminal properties, docks, warehouses, tracks, steam lighters, car floats and every instrumentality used under the contract. It includes the services and responsibility of Arbuckle Brothers, as agents, for the several lessees using the station, and their staff of employees engaged in receiving, delivering, loading and unloading freight thus received, both incoming and outgoing.** As the measure of compensation is the tonnage in and out of the station and as this compensation is paid by the several railroads maintaining the station in proportion to the tonnage which they severally handle, there is a sense in which it is in part an allowance to Arbuckle Brothers upon their own shipments. But they receive the same compensation upon the tonnage of every other shipper through that station, and it is the aggregate of the compensation which must determine the reasonableness of the allowance when we come to deal with it as an allowance to them for services or instrumentalities furnished, under Section 15 of the Act to Regulate Commerce.

That the compensation of three and four and one-fifth cents per hundred pounds upon the total tonnage in and out of this station is not unreasonable was and is not challenged, and therefore we pass that subject by."

The Arbuckle case goes beyond the present case inasmuch as payments were made for services rendered in connection with freight of which Arbuckle was the owner, whereas the Appellant warehouses here were not the owners of the goods received or shipped by them. (R. 148.) This Court said in the Arbuckle Case (at page 293):

"Upon the other hand, if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, **were entitled to demand a compensation reasonably commensurate with the facilities furnished, and the services performed.** Wight v. United States, 167 U. S. 512; General Electric Company v. New York Central Railroad, 14 I. C. C. Rep. 237; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46.

In the case last cited, it is said:

'The act of Congress in terms contemplates that **if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them.** That is taken for granted in Section 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is

complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, section 12, 36 Stat. 539, 551)'."

The Commission has recognized and specifically held that such terminal services are transportation services, and that the relation is that of agency. It so decided in:

Keystone Elevator and Warehouse Co. vs. Director General, et al., 73 I. C. C. 273.

In this case, the Keystone Elevator Company, which was complainant in a proceeding before the Commission, operated a grain elevator as agent for the Pennsylvania Railroad at North Philadelphia, Pa., for the receipt and delivery of freight. The revenues of complainant were derived in part from payments made by the railroad and in part from the charges paid by shippers for various services, including elevation, storage, bagging, mixing, etc. Complainant had no interest in any of the traffic handled through the elevator, and, therefore, was not a shipper or owner of property transported. A proceeding was instituted by the complainant seeking reparation, after an increase in the payment had been made by the Director General, the complaint alleging that the payment prior to the increase had been unjust and unreasonable.

In dismissing the complaint the Commission said:

"While complainant undoubtedly performs a transportation service, it does so, not as an independent entity, but **as agent of the Pennsylvania under contract. The service rendered is one which the Pennsylvania, by the publication of charges in its tariffs, holds itself out to perform.** Complainant stands in much the same position as an employee of the railroad and cannot be considered a common carrier whose compensation is to be derived from divisions of joint rates.

Furthermore, complainant has been unable to point out how the making to it of allowances which were unreasonably low would contravene any provisions of the law which we administer."

In the Peavey Case (next following), this Court again annulled an order of the Commission where the Carrier made payment for terminal services in connection with the handling of grain:

Interstate Commerce Commission vs. Diffenbaugh (the Peavey Case), 222 U. S. 42.

The Commission had instituted a proceeding to inquire into the legality of a contract between the Union Pacific Railroad and Peavey & Company whereby the Carrier made the private grain elevators of the Peavey Company its terminal "station" for the delivery and transfer of grain carried over its lines, constituted the Peavey Company terminal agents to receive, deliver, store and transfer the grain, and paid it a stipulated compensation and allowance for the use of its premises and for its services. Peavey & Company were also grain dealers and shippers of grain over the lines of the carrier on their own account, and received the same allowance for handling their own grain as for the grain of others. The Commission found the contract and payments made thereunder to be preferential and discriminatory, to amount to a rebate, and ordered the same to be discontinued. This Court annulled the Order of the Commission, and sustained the payments. The Court said (at page 46):

"The ground on which the payment to owners of grain finally was held to be a rebate (by the Commission) had been considered from the beginning, and, as we have said, had been brought to the mind of Congress. It is that when the owners of the elevators

own the grain put into them, they have the opportunity to perform other services to the grain in the way of treatment, or cleaning, clipping, and mixing the grain, which, although not included under the term 'elevation' or paid for by the railroad, it is an advantage to them to be able to perform at the same time. This advantage is thought (by the Commission) to create an undue preference and unjust discrimination. * * * The ground of the decision is that even an honest payment of the bare cost of elevating grain in transit gives an undue advantage if the elevator owner also owns the grain. * * * We agree with the Court below that this decision is erroneous in its conception of the grounds on which, under the statute, an advantage may be pronounced undue, and its assumption that Congress has left the matter open by merely permissive words. * * *

"The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the Act of Congress in terms **contemplates that if the Carrier receives services from an owner of property transported or uses instrumentalities furnished by the latter, he shall pay for them.** That is taken for granted in Section 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion) * * * there is nothing to prevent his (the carrier) hiring the instrumentality instead of owning it."

Moreover, the fact that the arrangement between Appellants and Carriers may incidentally be of value in the conduct of Appellants' warehouse business, furnishes no ground for presuming that the arrangement is in consequence illegal, preferential and discriminatory.

In the **Peavey Case**, 222 U. S. 42, the Court said:

"The law does not attempt to equalize fortune, opportunities or abilities."

In **United States vs. Baltimore and Ohio R. R. Co., 231 U. S. 290**, the Court said:

"That certain advantages inured to Arbuckle Brothers from the fact that their refinery was so near this public station that their product might be trucked or carried to the station at slight cost is obvious, * * * but these were business considerations which are far from showing any purpose to give them any illegal preference, or to discriminate against other shippers."

In the **St. Louis Terminal Case, 34 I. C. C. 453**, the Commission said (at page 462):

"* * * We must hold that the advantage enjoyed in their private capacity by the warehousemen conducting the off-track stations for the respondent, is incidental and not undue, under the Act to Regulate Commerce as amended."

The fundamental proposition is ably and tersely stated by Judge Buffington in the dissenting opinion, when he says, (R. 53):

"That the railroad may by contract constitute a warehouse a public freight station is as said by Supreme Court in United States v. Baltimore & Ohio Railroad, 231 U. S. 288, 'too clear for extended discussion'. If, then, such contract for substitution can legally be made, does it follow that because such a substitution is made with one warehouse and it is made a public freight station, that thereby the railroad has bound itself to establish as its additional

public freight stations all other warehouses in that vicinity? We think not, for, as said in 276 U. S. 518, 'The grant of privileges to respondent creates no duty on the part of the railroad company to grant like privileges to others and therefore there is no legal discrimination'. Indeed it would seem the mere statement of the proposition is its own answer. Now if the railroad can legally contract with one warehouse to make it a public freight station and if thereby it does not obligate itself to make every other warehouse a public station, it follows that in consideration of the designated warehouse agreeing to become a public station, the railroad may lawfully agree that it will not make any other warehouse a public station. For it will be observed that no warehouse has any general right to demand it be made a public freight station, but that it can be made such only when it and the railroad contract it shall be made such freight station.

Commenting on the freedom of railroads to control its passenger stations, the Supreme Court, in 276 U. S. 194, said 'There was no duty upon the petitioner, (the railroad) to accord to other taxicab men, the use of its lands simply because it had granted Welsh the privilege specified in its contract with him'. And in another case involving a similar question, the Supreme Court, in the same volume, at page 529, said 'There is here no complaint by or on behalf of passengers; no lack of service, unreasonable exaction or inconvenience of the public is shown. It would be unwarranted and arbitrary to assume that this contract is contrary to public interest. **The grant of privileges to respondent creates no duty on the part of the railroad company to give like privileges to others, and therefore there is no illegal discrimination.**"

The proposition that it is not unjust discrimination for a carrier to employ one agent of its own selection to perform a part of its public duties, and to refuse to make similar contracts with other parties, is fully supported by the following cases:

Delaware, Lackawanna & Western R. R. Co. vs. Morristown, 276 U. S. 182; 72 Law. Ed. 523.

The Court said, at page 194:

"There was no duty upon petitioner to accord to other taxicab men the use of its lands simply because it had granted Welsh the privilege specified in its contract with him. * * * Petitioner, (the railroad company) had no contract relations with taxicab men other than Welsh and owed them no duty because they did not have any business with it. The enforcement of the ordinance here assailed would operate to deprive petitioner of the use of the land in question and hand it over to be used as a public hack stand by the individual defendants and others."

Donovan vs. Pennsylvania Co., 199 U. S. 279.

Mr. Justice Harlan said, at page 296:

"The railroad company was not bound to accord this particular privilege (to come upon the premises of the railroad company for the purpose of transferring passengers and baggage) to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company, for it had no contractual relations with the defendants, and owed them as hackmen no duty to aid them in their special calling."

Great Northern Rwy. Co. vs. Minnesota, 238 U. S. 340.

Mr. Justice McReynolds said, at page 346:

"A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like other owners of private property, it may control its own affairs."

Brown & White Taxi Cab Company vs. Brown and Yellow Taxi Cab & Transfer Co., 276 U. S. 518; 72 L. Ed. 681.

Chicago, St. Louis & New Orleans R. R. Co. vs. Pullman Southern Car Co., 139 U. S. 75; 35 L. Ed. 97.

Express Cases, 117 U. S. 1; 50 Law Ed. 24.

POINT III.

The contracts were made in good faith and not as a cover for any fraudulent scheme to give rebates or any other illegal advantage.

This Court, as pointed out above, in the case of **United States vs. Baltimore and Ohio Railroad Company, 231 U. S. 290,** in referring to the Arbuckle contracts, placed emphasis upon the fact that the contracts therein were "made in good faith and not as a cover for any fraudulent scheme to give rebates, or any other illegal advantage". This may truthfully be said of the contracts which are at issue in the present case.

These contracts go back to the time when railroad tracks were found on Market Street and on North Broad Street, now in the very heart of the City of Philadelphia. In the Report of the Commission the fact that the system is of long standing is frankly conceded. In its Report in this case the Commission said:

"Defendants' practice of loading and unloading carload freight at Philadelphia has been in effect for many years. According to the Pennsylvania the practice first started in connection with the receipt and delivery of freight at waterfront stations having no team-track facilities. In time the practice spread to include other Philadelphia stations, not only on the lines of the Pennsylvania, but also on the Baltimore & Ohio and the Reading." (R. 146.)

The original Merchants Warehouse was built in 1887, and was owned in part by the Pennsylvania Railroad and the public. At that early date freight cars were delivered to it and unloaded by the warehouse company for the railroad company for the account of the consignees, who then had ten days free storage. New warehouses were established in order to serve public convenience as the City increased in size, and these warehouses were operated under contracts substantially similar to the original contract of 1887.

Representatives from the Commercial organizations of the City of Philadelphia voluntarily intervened in the proceedings before the Commission and testified to the sound economic necessities which were responsible, in the first instance, for the making of these contracts, and which at the present time afford ample justification for their continuance. As an example, Hubert J. Horan, President of the Commercial Exchange testified to the important bearing which this system has upon the handling of flour in connection with the food supply of the City of Philadelphia. He said (R. 408):

"I do not see how it would be possible for a flour man today to go back to the old method of handling flour, which was in effect prior to 1887. When you take into consideration the tremendous growth of Philadelphia since, and that we have to make deliveries in

almost every part of Philadelphia,—now for West Philadelphia as an illustration, we use 31st and Chestnut; for Kensington we use the warehouse up there; downtown we use 15th and Carpenter, Front and Federal, or Central we would use Front and Chestnut. To get warehouses we couldn't get railroad connections today, I don't believe, and to make an economical delivery for the benefit of the people,—the consumer, it would be an impossibility, and the cost would grow to such tremendous figures that I don't know, we would all have to localize our business. In other words, we could not make distribution really economically over the city of Philadelphia today."

It was his judgment that if the present system were changed, a Philadelphia dealer in freighted flour could not continue in the flour business. (R. 409)

William B. Gheen, Assistant freight traffic manager of the Reading Company, testified as follows, (R. 361):

"These contracts were made many years ago, and of course there is no one available who can state of their own knowledge as to the conditions that brought about these agreements, but from general information that can be obtained, the railroad companies at that time felt the need of additional facilities, where this carload package freight could be unloaded and taken care of, delivered, where additional facilities could be provided for storage and general service that might be required by the commercial interests of Philadelphia. It was also a factor advantageous to the carriers in having the equipment promptly released, as would not be the case on team track deliveries, and that in my belief brought about these contracts with the warehousing concerns."

An official of the Baltimore and Ohio Railroad Company thus explained the origin of these contracts, (R. 367):

"All my information as to the history of the arrangements with the Pennsylvania Warehousing & Safe Deposit Company, and what brought it about is hearsay. As the contract shows, the original contract, it was made in 1897, at the time the Baltimore and Ohio Railroad was in the hands of receivers. In fact the contract was made by the receivers. At that time the facilities of the Baltimore and Ohio Railroad were limited, and the receivers were quite anxious to increase the facilities here in some manner, shape or form, which would enable them to secure a much larger tonnage into and out of Philadelphia than had been handled."

The fact that the present arrangement inures to the benefit of the carriers and the public, negatives conclusively any assertion that there was a lack of good faith in the making of the contracts, or that there was any corrupt motive, vicious purpose, or concealed or purposed fraud in their making.

The United States Government took over the railroads during the war, and not only continued the arrangement for loading and unloading carload freight at appellants' warehouses, but made certain increases to the warehouse companies in the rates of compensation payable for such services. (R. 322). This is one more evidence of the good faith of the arrangement, as well, of course, as proof of the reasonableness of the payments made. There is no hint of secrecy or underhandedness in the arrangement. The Commission's report may be scanned in vain for any suggestion that the system is injurious or is not beneficial to the shipping public.

The only persons objecting to the arrangement are the six complaining warehouses. The gravamen of their complaint is that they are handicapped in soliciting the public for business.

Weighing all these evidential factors and findings, Judge Buffington, in his dissenting opinion, summarizes the situation as follows (R. 49):

"Seeing then that this contract warehouse system is shown to be a practice of forty years standing; that similar contracts were from time to time made by the Federal Court of this District through its receivers; that these contracts were acted upon by the Government during its operation of the railroad; that no shipper is complaining of any favoritism to competitors or burden imposed on him; that the large commercial bodies have felt the issue was of such vital importance to the Commerce of Philadelphia as to constrain them to intervene and oppose the unsettling of the tried-out practice of a generation, and that the only parties who complain are six warehouses, the gravamen of whose complaint is that they have not been made by the several railroads public freight stations; that the order of the Commission does these six warehouses no good in that it does not require the railroads to make these six warehouses public freight stations, but only compels the railroads to no longer make the twenty-four warehouses public freight stations for it, considering, we say, that such is the practical, commercial freight-handling situation before us, we next inquire whether the situation **was an illegal one which called for the preventive power vested in the Interstate Commerce Commission to put an end to it. There is no proof of any corrupt motive, vicious purpose, or concealed or purposed fraud. Everything has been done openly and above board.** The railroads have not and are not taking part in the controversy. No shipper is complaining and, as a practical question, the case resolves itself into a business dispute between twenty-four contract warehouses and six non-contract ones, with the Interstate Commerce Commission taking the part of the lat-

ter. Does the case warrant the order that body has made in supposed relief of these six? We say supposed relief, for in point of fact the order gives no affirmative relief to the six and only stops the present practice of the twenty-four. **Its anticipated effect is to lessen railroad efficiency. It deprives shippers of the benefit of freight loading and unloading at twenty-four convenient public freight stations and it puts an end to a business system which the twenty four warehouses have carried on in some cases for nearly forty years, and that without complaint.**

POINT IV.

The contract warehouse companies are not the consignors or consignees of the freight loaded or unloaded at their warehouses.

"The only relation that is subject to the Commission", says Mr. Justice Holmes in Ellis vs. Interstate Commerce Commission, 237 U. S. 434, 444, "is that between the railroads and the shippers". A finding that the contract warehouses are shippers is therefore a necessary prerequisite to the Commission's jurisdiction in this case. This was recognized by the Commission in the two McCormick cases. McCormick Warehouse Co. vs. Pennsylvania Railroad Co., 95 I. C. C. 301,—148 I. C. C. 299. At the first hearing, the McCormick Warehouse admitted that it was not a shipper or receiver of freight and the Commission concluded that it therefore had no relation to the common carrier, which could result in a discrimination against it in violation of the Interstate Commerce Act. At the second hearing, the complainant contended that it was a shipper, persuaded the Commission to that effect, and the Commission thereupon took jurisdiction.

The necessity of such a prerequisite was recognized in this case too. As Judge Buffington so well puts it,

> "It is upon this false assumption of the warehouse being the consignee that this entire proceeding is bottomed." (R. 53)

The Commission made two findings relevant to this point, viz:

> "The evidence indicates that no allowances are made on traffic consigned to or by the contract warehouses as such. The form of billing customarily used in the consignment of goods to the contract warehouses is to a named party care of the warehouse at which the carrier is to make delivery". (R. 145)
>
> "The contract warehouses, even though not the owners of the goods, have been given dominion over such goods for transportation purposes, and accordingly for transportation purposes they should be deemed the consignors of shipments from or consignees of shipments to their warehouses." (R. 148)

The first finding is a brief statement of an admitted fact. It fails to mention that the customary form of billing outbound shipments is by a named party to a named party without any mention at all of the contract warehouse.

The second finding is as Judge Buffington points out (R. 51) not a finding of fact at all.

Just what is meant by the statement that the contract warehouses have been "given dominion over such goods for transportation purposes" is far from clear. When a shipper delivers his goods to the railroad company for transportation, he gives the railroad company "dominion over such goods for transportation purposes". If this is the sense in which the Commission uses the phrase, then, of course, that finding does not support the conclusion that the party so given dominion over the goods, is the consignor

thereof. If the Commission uses the phrase to signify the legal status of a shipment consigned to X, care of Y, then it is not a finding of fact at all but a conclusion of law. When the Commission says that the warehouse company should be **deemed** the consignors or consignees, what is meant is that the legal situation is the same as if the warehouse were the consignee. This is a plain invention.

At another point, the Commission makes a distinction between substance and mere form. The gist of the Commission's finding is that the contract warehouses, although they are not parties to the billing, have no contractual relationship with the carriers, (other than the contracts of agency), and so far as any question connected with the law of contracts, or the law of shipper and carrier is concerned, have no rights, nevertheless, so far as the Interstate Commerce Commission Act is concerned, they are consignees in substance, although not in form.

With this contention, we take sharp issue. Whatever the form, it is the merchants who are in substance the consignees.

If the warehouse company is in substance the consignee, what is the relation of the owner of the freight? How many consignees can a single shipment have? A dealer in flour who buys two carloads of flour at Buffalo or Minneapolis and causes them to be shipped to him at Philadelphia, is the consignee thereof in both form **and** substance. Does it matter that one is billed to him in care of the public warehouseman with whom he chooses to deal, and the other at a public team track in care of the teamster with whom he chooses to deal? Does it deprive him of his status of consignee that he expects to employ the warehouseman and the truckman to render their respective services after the transportation shall have been completed?

The testimony of the persons beneficially interested in the goods,—owners, buyers, sellers and dealers, as distin-

guished from warehousemen—shows clearly that they, and not the contract warehouses, are in a real and substantial sense, the shippers or consignees. This is quite as true of the shippers called by the complainant (R. 240 to 243 and R. 254 to 266) as by those called by the intervenors in behalf of the defendant. (R. 404 to 423) Referring to themselves as **patrons** of the warehouses, they speak of the goods shipped **by** them or **to** them through the contract warehouse. (R. 240, 241) Flour is usually shipped by western millers to the millers' own order, care of the contract warehouse. The bill of lading is attached to a draft on the Philadelphia buyer for the purchase price. The western millers" sole complaint with the system was that the unloading of flour into the warehouse without the surrender of the bill of lading, encourage buyers who had no demurrage charges hanging over them, to postpone the payment of the draft. They said it was commercially impossible to consign the flour for track delivery because the buyers insisted on warehouse delivery. The very nature of this dispute (which was the principal subject of the testimony of five witnesses) shows that the millers consider themselves the shippers and consignees, and no more deemed the warehouse the consignee than they deemed the team track the consignee.

The testimony of the eight shipper witnesses, called by the two sides, in no wise conflicts with regard to the question of who is the real consignor and consignee. That testimony shows that the contract warehouse merely receives and loads or unloads and delivers the freight on behalf of the carrier, and in some cases, stores it as public warehousemen. It is a total stranger to the commercial transaction behind the transportation. It does not control the billing, does not control the routing, does not pay the freight, does not determine when delivery is to be made, nor to whom. It is the consignee neither in form nor in substance. The form follows the substance. In substance,

as in form, the owner or seller is the consignor. In substance, as in form, the consignee is either the seller or the buyer or the broker.

We submit that the undisputed testimony shows that the shippers are, in fact, and deem themselves to be the consignors and consignees, and consider the contract warehouse companies as the agents of the railway.*

We submit that the Commission should not dismiss so cavalierly the so-called "form" of the transaction. Who is the Consignee and who is the Consignor in a Bill of Lading is no more a mere matter of form than who is the maker or payee of a Note. Important legal and commercial conse-

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*"It is my understanding that these warehouses are the agents of the railroad * * * the principal objection of our mills is the fact that through the association of one man acting as railroad agent, warehouse manager and banker, it reacts to the disadvantage of our mills principally due to the fact that our items that are sent through on arrival draft and our goods which are sold on arrival draft basis are not paid for in some cases for five or six months." (R. 256)

"As to whether our complaint is that the railroads take it or put it in storage instead of collecting the bill, our complaint is that they unload it without getting the bill of lading." (R. 259)

"I think this agency relation ought to be discontinued * * *. I am basing that opinion on shipments I have made." (R. 259)

"It would help solve our difficulty if this provision by which the railway company paid for the unloading or loading of flour, and the handling of the flour, should be cut off. The result would be that the consignee of the car or the man who shipped it would have to pay the handling charge himself. It is my idea then, that on 80 or 90 per cent. of the flour in Philadelphia the people who are dealers or the people who are the shippers ought to pay say 40 or 50 cents a ton for handling." (R. 260)

"The objection as I see it, on the part of the millers of the United States to this particular arrangement is * * * Second, that it, in effect, makes the goods shipped in the manner described by Mr. Knighton and Mr. Purchase subject to delivery to an agency of the railway company with which we have no privity of contract under the bill of lading or otherwise." (R. 264)

quences follow from the exercise of choice on the part of a person executing a Bill of Lading as to the persons to be named in that document as Consignor and Consignee. The difference in "form" between two Bills of Lading, one showing consignment to care of the contract warehouse, and another to a complaining warehouse, notify X, produces important differences in the substance of the commercial transaction. The contract warehouse has no right in the goods and no liability on the Bill of Lading. The complaining warehouse has both. It is needless to go into these rights and liabilities. Many of them are codified in the Bills of Lading Act. Section 42 of that Act, (U. S. Code, Title 49, Section 122), defines "Consignee" and "Consignor" as follows:

> "'Consignee' means the person named in the Bill as the person to whom delivery of the goods is to be made.
> "'Consignor' means the person named in the Bill as the person from whom the goods have been received for shipment".

See also—

Smokeless Fuel Co. vs. Norfolk and Western Railroad Company, 85 I. C. C. 395.

It is suggested by the Commission that the contract warehouses must be the Consignees because they "are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to the contract warehouses for distribution in less than carload lots". (R. 148). Surely a person may be the consignee of goods which he is not physically prepared to accept. If a manufacturer has a carload of goods shipped to himself or his representative at team-track delivery, or at a station operated by the Railroad's own employees, and if that agent or that representative has a truckman call for the goods and deliver some of them

to the purchasers and the rest of them to a warehouse company, that manufacturer or his agent is in form and substance the Consignee. We fail to see how the legal aspect of the transaction is changed merely by shifting the place of delivery. The Commission's error in the reasoning quoted above is that it assumes what it wants to prove; it says that the warehouses are the parties to whom delivery of the goods is made. Delivery is made at the warehouse to the Consignee or on his order. It is, of course, well settled that delivery on the order of the Consignee satisfies the carrier's obligations. **City National Bank vs. El Paso and Northeastern Railroad Company, 262 U. S. 695,**

Utley vs. Lehigh Valley R. R. Co., 292 Pa. 251.

A carload of freight to two or more persons, each holding an order from the Consignee for part of the carload, is what is called a split delivery. That the carriers at their own stations may make split deliveries has been expressly recognized by the Commission, **(Loading and Unloading Carload Freight, 101 I. C. C. 394, 403).** There is then nothing inherently illegal about delivering a single carload of freight to two or more persons upon the order of a Consignee who is not prepared to accept the carload shipment, and if such a delivery can be made by the carriers' employees, it can, under the rule of the Arbuckle Case, be made by its contractual agent.

The real question, of course, is what is a reasonable rate to be charged for a carload of freight which receives a split delivery. The Commission recognizing this, has fixed a maximum charge for rendering such a service. (Loading and Unloading Carload Freight, Supra.) Such an issue would arise in this case if and when the carriers demanded compensation in addition to the freight rate which for the past forty years has included such deliveries in Philadelphia.

As we have pointed out the Commission's argument as to split deliveries completely overlooks the large number of cases where the delivery is made to the consignee or on an order covering the entire carload, and it ignores the outbound shipments which are made by the owner of the freight in his own name, yet the Commission's order does not ignore this traffic. The legality of the order depends upon the proposition that all traffic received at the warehouse is shipped to the warehouse, and that all traffic shipped from the warehouse is shipped by the warehouse.

To say that the owner of the warehouse, at which the consignee desires his goods to be delivered, is to be deemed the consignee, is a mere fiction. "Fortunately", as Judge Buffington so well says in his opinion, (R. 55) "in the interest of actual facts the giving of the name of consignee or consignor to such a warehouse does not make it such, if in truth and verity it was not the consignor or the consignee".

POINT V.

Payments made to the contract warehouses are not rebates.

The most unwarranted statement in this entire case is the holding that the payments to the contract warehouses are rebates. The reasoning of the Commission on this point is concentrated in two sentences:

> "It is fundamental that an unlawful discrimination practiced under authority of a tariff is just as evil as one which is practiced contrary to a tariff." (R. 149.)
>
> "The Record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses. (R. 150.)"

The word "rebate" is used but once in the Interstate Commerce Act, and that is in Section 2. It is also used in the Elkins Act, U. S. Code, Title 49, Section 41, and signifies the gist of the offense under that criminal statute. The complaints in this case before the Commission charge that the payments are rebates under both of these provisions. (R. 115.)

Section 2 of the Interstate Commerce Act provides as follows (U. S. Code Title 49, page 1653):

> "If any common carrier subject to the provisions of this Act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Using the word rebate in the sense in which it is used in the Interstate Commerce Act (as distinguished from the Elkins Act) a finding that a rebate is paid, is a mere finding of a violation of Section 2. To say that there is unjust discrimination and a rebate is mere repetition. It sounds worse to call it a rebate than to call it unjust discrimination, but it means the same thing.

A rebate, as used in the Elkins Act, means a secret departure from the published tariff. It is a device where-

by property is "transported at a less rate than that named in the tariffs published and filed by such carrier." (Elkins Act, Section 1.) Now, the payments here in question, are all provided for in tariffs so that there can be no contention of a violation of the Elkins Act. It is quite true that "an unlawful discrimination practiced under authority of a tariff" is a violation of Section 2 of the Interstate Commerce Act, but it is not a violation of the Elkins Act. The use of the word rebate, therefore, merely confuses matters. It denotes a violation of Section 2, but it connotes secrecy, corruption, and underhandedness.

Any such suggestion is utterly unwarranted. If the Commission believed that there was a violation of the Elkins Act it would have instituted proceedings under that Act years ago. The published tariffs set out the whole arrangement. The system is well known to the entire shipping public of Philadelphia. Its origin, forty years ago has been noted. It originated as a cooperative venture of the shipping public and the railroads to permit the removal of the tracks from one of Philadelphia's principal streets. The usefulness of the arrangement from the carrier's point of view is entirely obvious. It secures prompt release of equipment, permits efficient use of crowded terminal facilities in the center of a great city and protects the freight in the carrier's custody against pilferage and damage. No corrupt motive for making the contracts is suggested. The Baltimore & Ohio contracts were originally made by receivers appointed by the Court. All of the contracts were taken over by the United States during the railroad administration and the payments thereunder were increased. No suggestion has ever been made that the payments are excessive in amount, and the complaint to the Commission contains no prayer under Section 15, paragraph 13 of the Act asking the Commission to fix a maximum allowance.

There is no showing that any part of the payments made to the warehouses have been passed on to any shipper, nor is there any showing of preference of one shipper over another. The arrangement is available to all shippers and all the shippers use it. Indeed, that is the very gist of the complainant's claim for damages. No shipper complains of the arrangement. On the contrary, even the shippers whom the complainants called, disavowed any objection to the system, (R. 242) and said that if arrangements could be made so that the slow buyers would pay their drafts promptly, they would consider it "a rather good arrangement." (R. 263.) As for the shipping public of Philadelphia, they have intervened through the trade organizations strongly to oppose its elimination.

The Commission's report may be scanned in vain for any suggestion that the system is injurious or is not beneficial to the shipping public. The Commission finds that even the complainants have failed to show that they have suffered actual pecuniary loss attributable directly to the alleged unlawful practices, (R. 150). Judge Buffington in the Court below points out the immense advantages of the arrangement to the public, and we think it a fair inference from the last paragraph of the majority opinion, (R. 43), that the majority considered the practice a technical rebate but not one which injures the public.

On this branch of the case, we point again to the close parallel between this case and the Peavey Case. In the Peavey Case, as here, the carriers entered into the arrangement for legitimate reasons of their own; indeed for the same considerations as influenced them here, to wit; to secure prompt release of equipment and in order to obtain competitive business. There "the railroad company in 1899 made a contract in good faith with Peavey under which he built an elevator." The contract provided the amount of his payment and later another elevator was

brought into the arrangement. In this case, the Merchants Warehouse was first built to perform the desired services and the arrangement was later extended to other warehouses. The good faith of the contract for unloading the flour and other package freight is equally apparent. In the Peavey Case, the Court considered it important to remark that in no case was any additional charge made to the shipper for the elevator service. In this case, no additional charge is made to the shipper for the service of unloading the flour. In that case, it was pointed out that the service of elevation was a transportation service as defined by the Act. The same definition includes the loading and unloading practiced here. There, the Commission held that there was a rebate because of the incidental advantages accruing to the elevator.

> "* * * the ground of the decision is that even an honest payment of the bare costs of elevating grain in transit gives an undue advantage if the elevator owner also owns the grain." (Interstate Commerce Commission vs. Diffenbaugh, 222 U. S. at page 46.

In this case, it is contended that an honest payment of the bare cost of unloading the freight gives an undue advantage to the warehouse company. And the holding of this Court that such payments were not rebates, should have been respected by the Commission here. There is, of course, one important difference between this case and the Peavey Case. In the Peavey Case, the payment was made to the **owner** of the grain. In this case, it is conceded that the warehouse companies do not own and have no beneficial interest in the freight. But, even if they were the owners or were to be deemed to be identified with the owners, still under the rule of the Peavey case, the payment to them of the cost of unloading is not per se unlawful.

POINT VI.

The contract warehouses are public freight stations.

The Commissioner found:

> "The facilities of the contract warehouses, while nominally open to the general public as railroad freight stations, are not, in fact, public stations, but are confined to the handling of merchandise for the patrons of the warehouse" (R. 148).

If the phrase "confined to the handling of merchandise for the patrons of the warehouse" means that the use of the warehousing facilities is made a prerequisite for the use of the freight delivery facilities, such a statement is directly contrary to the uncontradicted evidence. As already mentioned, shippers of about 1000 cars a year, outbound, used the Merchants Warehouse Company as a freight station without using it for storage. Inasmuch as the warehouse company handles about 10,000 cars a year, both inbound and outbound, it appears that the 1000 cars which are handled without any warehousing is a substantial percentage of the outbound freight. Similarly, the proportion of inbound freight which was delivered directly to the consignee without storage, varied from 35% to 80% of the total (R. 310, 386, 401).

The patrons of the warehouse are the patrons of the railroad,—that is to say, the shipping public of Philadelphia. The extent to which they use the warehouses is indicated by the fact that 85% to 90% of the flour consumed at Philadelphia passes through the contract warehouses (R. 260).

But the important finding is that the carriers have denominated the contract warehouses as their stations.* The public has the right to use the stations whenever they please.

> "It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business, which is the real criterion determinative of its character." **(Tap Line Cases, 234 U. S. 1, 24).**

The public profession in the railroad tariffs makes them freight stations in law. The evidence shows that they are used by the public as freight stations in fact. The contract warehouses are both nominally and actually freight stations.

To quote again from the dissenting opinion of Judge Buffington in the Court below:

> "Indeed, as we sense this case, the decisive question is whether these warehouses were in good faith made public freight stations by the railroad and whether the warehouses have honestly and in good faith and reality acted as public freight stations in the receipt of outgoing and the delivery of incoming freight. That test was clearly pointed out and made the decisive factor in the Baltimore case (Terminal Warehouse Co. v. U. S., 31 Fed. (2d) 951). A study of that case shows that the warehouses were designated in the tariff sheets as public freight stations,

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*The Pennsylvania and the Baltimore and Ohio have so designated them in their tariffs filed with the Commission. The Reading took the view that publication in the tariff was not a necessary part of the inclusion of the warehouses in the station facilities which they adjoined, but expressed a willingness on brief so to publish the holding out in their tariffs if the Commission felt such was proper.

but in the proofs it was shown in that case, as Judge Soper says, 'that the terminal warehouses, though nominally open to the general public, are in fact confined to the receipt and forwarding of merchandise concerning which the Terminal is employed to render some warehouse service.' In other words, the railroads and warehouses in that case compelled the shipper to submit to the warehouse storage charges if he used the station. In the present case no such condition exists. The shipper simply ships and the warehouse simply receives and forwards the freight thus received without compelling any, or even contracting for any, precedent storage. In the present case any outbound shipper desiring storage or shipment, if he so desires, and any shipper not desiring warehouse facilities may use the warehouse simply as a freight station. * * *

We have already noted some of the facts in reference to the use of these warehouses as public freight stations and reference is further made to the fact that 35% at some of the contract warehouse stations and 75% at others were delivered to the actual consignees within the forty-eight hours of free time and were not warehoused at all. At the Pennsylvania Warehousing Stations from 40 to 60% of incoming freights were taken away without being stored, and at the Philadelphia Warehouse and Cold Storage Stations 80% were so taken. These warehouses being then in truth and in fact used by the public and the railroads as public freight stations, it seems to me that the Baltimore case is an authority in favor of the warehouses and not of the Interstate Commerce Commission." (R. 56-58)

POINT VII.

Assuming, arguendo, that a finding of unjust discrimination and undue prejudice under Sections 2 and 3 of the Interstate Commerce Act was valid, the order which was made exceeded the power of the Commission in that it went beyond a requirement that the carriers cease and desist from the violations of the Act.

For the purposes of the discussion which follows, we shall accept the fiction on which the complainants' case was based. If then it be conceived that both the contract warehouses and the complaining warehouses are shippers, it follows that the carriers must treat them both alike. A carrier which makes payments to the contract warehouses for unloading the freight must likewise pay a corresponding amount to the complaining warehouses for performing the same service.

Union Pacific R. R. Co. vs. Updike Grain Company, 222 U. S. 215.

That case grew out of the same arrangement as the Peavey case. The railroad company paid the Peavey Elevator an allowance, but refused to pay Updike a similar allowance for elevating his grain. Updike complained to the commission, and demanded reparation for the injury done to him by the undue prejudice practice by the railroad. The railroad contended that Updike and Peavey were not similarly circumstanced, but the commission found that they were, and awarded reparation. This Court sustained that award.

Following the rule of the Updike and Peavey Cases, and still assuming, *arguendo* that the contract and complaining warehouses are shippers, the Commission, having found the circumstances of the two shippers similar, should have issued an order requiring the railroad to cease and desist from the unjust discrimination practiced between them. The Commission had no right to make an

order which goes further than to direct the Carriers to obey the law which it administers.

When carriers violate Sections 2 and 3 of the Interstate Commerce Act, they may be required to cease and desist from such violation, but they must be left "free to remove the discrimination by any appropriate action."

> **United States vs. Pennsylvania R. R., 266 U. S. 191, 199;**
> **American Express Co. vs. Caldwell, 244 U. S. 617;**
> **Houston etc. Ry. vs. United States, 234 U. S. 342;**
> **Central R. R. vs. United States, 257 U. S. 247.**

See also

> **Great Northern R. R. Co. vs. Minnesota, 238 U. S. 340.**

Ordinarily, as in this case, there are two methods of removing the discrimination. If one of these methods violates some other Section of the Act, then, of course, the Commission can require that the Section 2 and 3 violations be removed by the other method. That is the principle which the Commission purports to be following here. It says after finding that payments to one without payment to the other is unjust discrimination:

> "The record discloses that these allowances are nothing more than a device to attempt to lend legality to the payment of rebates to the contract warehouses. It is apparent that the unjust discrimination and undue prejudice can lawfully be corrected only by terminating the allowances. Defendants will, therefore, be required to cease and desist from publishing or making such discriminatory and preferential allowances." (R. 150)

The fallacy of the Commission's reasoning here is the assumption that the giving of a rebate violates some

provision of the Act other than Section 2. We have pointed out that these payments are not rebates within the meaning of the Elkins Act because they are published, and the Peavey Case is authority for the proposition that they are not illegal per se. The fallacy of the Commission's reasoning will become at once apparent if we substitute for the word, "rebate", the phrase, "unjust discrimination". The ultimate finding of the Commission then comes to this:

> The practice of defendants in making allowances to the contract warehouses and refusing to make similar allowances to complainants results in unjust discrimination. These allowances are nothing more than a device to attempt to lend legality to an unjust discrimination. Therefore, the unjust discrimination can lawfully be corrected only by terminating the allowances.

This difference between the Order which was made and the Order which would have been within the Commission's jurisdiction (assuming that the contract warehouses are shippers) is vital. To the appellant warehouses it is the difference between impairing the obligation and validity of a contract, and respecting it. To the appellant trade bodies, it is the difference between the curtailment of a valuable, long established and important transportation service and the continuation, not to say, the improvement of that service.

The Commission's order likewise exceeds the Commission's powers in that it requires the carriers to cancel their tariff provisions which make the facilities of the contract warehouses a part of the carriers' station facilities.

It will be remembered that the Pennsylvania Railroad and the Baltimore and Ohio Railroad published tariffs, providing in effect that the warehouse companies

are part of their station facilities. The Commission orders these provisions to be cancelled. This clause of the orders betrays the weakness of the Commission's contention that the contract warehouses are not public stations. The tariff publications are a public profession of willingness to serve the public at the points named, and if this public profession did not make those stations public stations there would be no need of cancelling the provisions. They would be a mere nullity. The train of reasoning runs like this,—

As long as the carriers publish tariffs stating that the contract warehouses are public stations, they are public stations. As long as they are public stations the carriers can undertake to load and unload freight there. As long as the carriers undertake to load and unload freight there, they can employ agents of their own choice to perform that duty, and as long as they employ agents they can pay them reasonable compensation. The only way of striking down the system, therefore, is to compel the carrier to cancel their tariff provisions making the contract warehouses public stations. The Commission, having determined to strike down the system, includes such a provision in its order.

The difficulty is that there is no clause of the Interstate Commerce Act which remotely suggests that the Commission has power to compel the carriers to give up freight stations which they are willing to maintain. Under some circumstances the carriers can be required to give additional service, or can be prohibited from discontinuing an existing service. This is the first case in our knowledge where a carrier has ever been prohibited from rendering a service which it is willing to render,—a service which it believes to be in its own interest as well as that of the public,—a valuable service of long standing on which the public of a great City has come to depend.

POINT VIII.

The court below had jurisdiction.

The Appellants are informed that the Commission may urge in this Court a point not urged in the Court below, to-wit, that the District Court of the United States for the Eastern District of Pennsylvania had no jurisdiction because of the fact that the carriers are not parties to the litigation.

Sprunt and Sons vs. United States, 281 U. S. 249.

In the present case the order of the Commission mentions the Appellant warehouses by name and orders the defendant carriers to break their contracts with the Appellant warehouses. This clearly gives the Appellant warehouses, "an independent legal right, * * * (which) was affected by the order which it was sought to set aside". (Sprunt and Sons vs. United States, Supra, at page 257.)

Reference is made to a foot note in the report of the case last mentioned wherein is pointed out the difference between the Sprunt Case and four earlier cases, in which jurisdiction was taken of suits to enjoin an order of the Commission by persons other than the carriers. In two of these cases, **(Interstate Commerce Commission vs. Diffenbaugh, Supra, and United States vs. Hubbard, 266 U. S. 474)** it is noted that rights arising under contracts with the railroads give the plaintiff a status to contest the legality of the orders. That is precisely the case with these appellant warehouses.

Sprunt was a shipper, not named in the Commission's order, who relied on rights alleged to arise under the Interstate Commerce Act. The rights of the appellant warehouse companies are not created by the Interstate Commerce Act, but independently thereof. No relief is asked by these appellants of the Interstate Com-

merce Commission. They contest and defend against an interference with their contract rights.

CONCLUSION.

In accordance with the foregoing it is respectfully submitted that the Order and Decree of the Court below should be reversed.

Respectfully submitted,

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